Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-814

in the Supreme Court of the United States

OCTOBER TERM, 1985

ALAN C. KAPLUS,

Petitioner,

vs.

GENE E. PHILLIPS, WILLIAM S. FRIEDMAN
SYNTEK OF FLORIDA, INC.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

REPLY BRIEF ON WRIT OF CERTIORARI

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Respondent has missed the point.

Ross v. Bernard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) in a footnote reiterates a three part test for determining whether the right to trial by jury exists.

First, historically, did the case sound at law or in equity? Accounting suits were tried in both courts.

Second, was a legal or equitable remedy sought? Accounting was both a legal and an equitable remedy.

Third, could a jury understand the case? In *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962), this Court opined that because Rule 53(e)(3) Fed.R.Civ.P. allows a court to appoint special masters to assist a jury and unravel the accounts, seldom if ever, could this third ground be used to deprive a litigant of the Seventh Amendment right to trial by jury.

Had the Eleventh Circuit simply ignored *Dairy Queen* and followed *Ross*, this case might not warrant future review.

But it did more. The Third Court in *In re Japanese Electronic Products Anti-trust Lit.*, 631 F.2d 1069 (3rd Cir. 1980) has either rejected *Ross* or defined the third *Ross* test to require that in order to warrant dispensing with the Seventh Amendment, the matter must be so unintelligible to a jury that to try it to one would deprive a litigant of his Fifth Amendment right to due process of law. The Eleventh Circuit here, has not only

refused to follow the Third Circuit, but has interpreted this Court's *Ross* language:

> ". . . the practical abilities and limitations of juries . . ."

to mean that an observation that the matter is "certainly complex" is sufficient to warrant a bench trial.

This case and its progeny, if allowed to live and breed, will spawn confusion, uncertainty and havoc in an area of the law long guarded by this Court as the bastion of our liberties, the right to trial by jury.

Respectfully submitted,

RICHARD L. LAPIDUS
Attorney for Petitioner